

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

JAMES J. FITZGERALD,

Plaintiff,

v.

**CAROLYN W. COLVIN,
Acting Commissioner of Social Security,**

Defendant.

No. 3:10-cv-01222

Judge Nixon

Magistrate Judge Griffin

ORDER

Pending before the Court is Plaintiff James J. Fitzgerald's Application for Attorney Fees ("Motion") (Doc. 22), filed with a Memorandum in Support and an affidavit (Doc. Nos. 22-1; 22-2), and seeking to award \$2,940.00 in attorney's fees to Mr. Fitzgerald's counsel under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2012). The Commissioner has not responded to the Motion.

Under the EAJA, a prevailing party in litigation against the United States may seek attorney's fees, so long as the party files for the fees within 30 days of the final judgment. 28 U.S.C. § 2412(d)(1)(A)–(B). In social security cases, a sentence of remand to the Commissioner by the court constitutes a victory for the plaintiff, such that he or she may seek attorney's fees under the EAJA. *Shalala v. Schaefer*, 509 U.S. 292, 301 (1993).

Here, on December 21, 2012, Magistrate Judge Griffin entered a Report and Recommendation that advised this Court to reverse a decision of the Administrative Law Judge denying benefits to Mr. Fitzgerald and to remand his case for further proceedings. (Doc. No. 18.) The Court subsequently entered an Order adopting the Report and Recommendation on January 22, 2013 (Doc. No. 23), and the Clerk entered the judgment on January 23, 2013 (Doc.

No. 24). However, Mr. Fitzgerald filed his Motion before the Court issued the Order and based on the findings of the Report and Recommendation alone. (Doc. No. 22-1 at 1.) Because no judgment had entered at the time of the filing, Mr. Fitzgerald was not yet a prevailing party, and his Motion was premature.

Accordingly, the Motion (Doc. No. 22) is **TERMINATED AS MOOT** and Mr. Fitzgerald is directed to re-file his request for attorney's fees based on the final judgment in this case.

It is so ORDERED.

Entered this the 15th day of February, 2013.

A handwritten signature in black ink, appearing to read "John T. Nixon", written over a horizontal line.

JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT